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100TH CONGRESS
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SENATE

REPORT
100-601

ESTABLISHING THE NATIVE AMERICAN MUSEUM CLAIMS COMMISSION

OCTOBER 21 (legislative day, OCTOBER 18), 1988.—Ordered to be printed

Mr. INOUYE, from the Select Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 187]

The Select Committee on Indian Affairs, to which was referred the bill (S. 187) to establish the Native American Musuem Claims Commission, having considered the same, reports favorably thereon with an amendment and recommends that the bill (as amended) do pass.

The amendment is an amendment in the nature of a substitute.

PURPOSE

S. 187 establishes a five member Native American Museum Claims Commission appointed by the President and confirmed by the Senate. The Commission would have the authority to resolve disputes between museums and Indian tribes or Native Hawaiians over three categories of objects held in museum collections: Native American skeletal remains; ceremonial objects; and grave goods. The Commission would have the authority to issue orders of repatriation if it determined that such repatriation is warranted, based upon an investigation of the facts and hearings to provide both parties to a dispute the opportunity to present their views.

BACKGROUND

For several years there has been increasing controversy between Indian tribes and museums over Native American objects such as skeletal remains, ceremonial objects and grave goods which are housed in museum collections. The controversy has focused on the Smithsonian collection of 18,500 Native American skeletal remains.

However, the Committee is aware of other disputes over repatriation in states such as Alaska, Montana, Kansas, Nebraska, North Dakota, South Dakota and New York.

In these disputes, tribes are generally claiming skeletal remains and objects from museum collections which they believe were acquired without the consent of the tribe or individual Indians. Although there are a few well-publicized exceptions, museums have generally resisted repatriation claims from Native Americans on the basis that Native American collections should be maintained in permanent curation for reasons of historic preservation and scientific analysis. The museum position of retaining skeletal remains and other objects is buttressed by the Antiquities Act of 1906 which has been interpreted by the Department of Interior and museums to preclude repatriation of any antiquities removed from public lands. The Antiquities Act requires that objects removed from public lands under the authority of the Act be held in permanent museum collections. Museums generally presume ownership of skeletal remains and other objects while the tribes assert that title to skeletal remains and ceremonial objects is held by the tribes, unless the tribe or an individual member specifically transferred title to the museums by consenting to the disturbance of graves and the subsequent collection of skeletal remains. The Archaeological Resources Protection Act of 1979 continues the dispute by defining skeletal remains and other archaeological resources found on the public lands as the property of the United States.

S. 187 was developed to establish a workable process under which Native American claims to certain categories of objects in museums can be adjudicated and resolved in a uniform and timely fashion. The proposed Native American Claims Commission which would be created by S. 187 is based upon the model of the former Indian Claims Commission which functioned for over 20 years to investigate and resolve land claims between tribes and non-Indians.

The bill is based upon an assumption that there is a compelling need for federal legislation to establish an efficient and fair process to consider Native American claims to human skeletal remains, grave goods and ceremonial religious objects held in museum collections. The purpose of the legislation is to facilitate repatriation of such items when the facts substantiate that the items were acquired without the consent of affected Native Americans.

Historically and presently in this country, anti-grave robbing and mutilation statutes as well as the common law of dead bodies and of sepulcher are strictly enforced for all people, but the Native American community has not enjoyed the protection of these laws. As a result, there has a systematic expropriation of Native American dead on a large scale over the years. It is the view of the Committee that there is a need for legislation in order to rectify the harm which has been inflicted upon Native American religious liberty and cultural integrity by the systematic collection of Native American skeletal remains, grave goods, and certain ceremonial objects which are required for the on-going conduct of religion.

The facts supporting the bill go back to 1979, when the Carter Administration submitted to Congress the *American Indian Religious Freedom Act Report* as mandated by Section 2 of the Ameri-

can Indian Religious Freedom Act. The *Report* described the ways in which Native American graves have been disturbed:

> Native American religions, along with most other religions, provide standards for the care and treatment of cemeteries and human remains. Tribal customary laws generally include standards of conduct for the care and treatment of all cemeteries encountered and human remains uncovered, as well as for the burial sites and bodies of their own ancestors.
>
> The prevalent view in the society of applicable disciplines is that Native American human remains are public property and artifacts for study, display and cultural investment. It is understandable that this view is in conflict with and repugnant to those Native people whose ancestors and near relatives are considered the property at issue. Most Native American religious beliefs dictate that burial sites, once completed, are not to be disturbed or displayed, except by natural occurrences.

The *Report* also identified ways in which museums acquired the remains and grave goods so disturbed:

> Many sacred objects are taken from Native graves located on Indian and public lands and donated to museums by persons possessing federal permits under 16 U.S.C. 432. By statute, all such gathering is undertaken for permanent preservation in public museums. No provision exists in 16 U.S.C. and 43 C.F.R. Part 3 for Native use and possession of sacred objects taken in this manner.

Specifically, pursuant to the Antiquities Act of 1906, (16 U.S.C. 432 and regulations thereto) which predates the Archaeological Resources Protection Act of 1979, (16 U.S.C. 470aa-11), human remains which were removed from graves located on federal lands under federal Antiquity Act permits and housed in non-federal museums are under the control of the Smithsonian Institution. Under 43 C.F.R. 3.17, no such collections may be removed from museums without the written consent of the Smithsonian, and if such museums cease to exist, such collections revert back to the Smithsonian.

The *Report* did not include estimates of the numbers of human skeletal remains held in museum collections and there does not seem to be any precise estimate available on the number of skeletal remains held in institutional collections across the country. In response to a request from the Committee, the American Museum Association (AMA) polled its membership to determine the number of human remains held by those institutions. In August, 1988 the AMA provided the Committee with a letter indicating that roughly half of its membership had responded to a survey and acknowledged holding 48,000 human remains in their respective collections. The AMA did not divulge the identity of the institutions holding such remains and asserted that these remains are "owned" by the respective institutions.

In addition, the Smithsonian Institution holds a collection of 18,500 Native American skeletal remains. Federal and state agencies also possess collections of Native American artifacts which may include human skeletal remains, and the Committee notes that the National Park Service, for example, has an uncataloged collection of Native American artifacts of 15.5 million objects in its asserted possession. Based on this data, the Committee estimates

that a significant number of Native American human skeletal remains are held by museums and other institutions across the country.

Museums and other institutions have acquired Native American skeletal remains by a variety of means. The Smithsonian, which holds the most publicized skeletal remains collection, was acquired in part from the Army Medical Museum. The Army started collecting Indian skeletons in 1896, pursuant to an Order of the Surgeon General which required Army Medical Officers to—

> Form a collection of Indian craniums to aid in the progress of anthropological science by obtaining measurements of a large number of skulls of aboriginal races of North America. . . . It is chiefly desired to procure a sufficiently large series of adult crania of the principal Indian tribes to furnish accurate average measurements.

This order led to a period of about 40 years of zealous collecting of Indian crania and skeletons, which resulted in the collection of nearly 5,000 Indian skulls and skeletal parts, most of which were specifically identified by tribal and geographic origin and in many instances by name. In addition to the Army Medical Collection, Native American remains have been acquired through archaeological excavation conducted both by professional and amateur archaeologists.

The Committee has reviewed records associated with the collections activity conducted by Army Medical Officers and amateur collectors and notes the particular lack of sensitivity towards the Indian people and the flagrant instances of outright "grave robbing" which characterized this era. There is also the contemporary problem of the reluctance of museums to consider requests for repatriation of skeletal remains and Native American objects which were obtained under questionable circumstances. The Committee believes that the Federal government has an obligation to rectify this past injustice to Native Americans by creating the opportunity for these remains to be returned to the tribes and descendants for proper and fitting reburial.

Moreover, another flurry of activity followed the enactment in 1960 of the Reservoir Salvage Act, P.L. 86-523, U.S.C. 469. Under the RSA, numerous Federal agencies for the first time were required to and received funding for the recovery of skeletal material, grave goods, and other artifacts associated with prehistoric and historic Native occupation sites prior to the development of federal water storage and flood control projects. The federal collections of these materials burgeoned under what has come to be regarded as the era of "salvage archaeology".

The Committee is aware that numerous disputes are occurring between museums and Indian tribes as a result of tribal requests for repatriation of human remains, attendant grave goods and ceremonial objects. There are a few examples where museums and tribes have successfully negotiated these claims and items have been repatriated which include the return of some "War Gods" from the Denver Museum of Art to the Zuni Tribe of New Mexico; the return of Wampum Belts by the Heye Foundation to the Confederated Tribes of the Iroquois; and most recently the return of 16

crania by the Smithsonian Institution to the Blackfeet Tribe in Montana.

The Committee is also aware of the development of state law and policy to address the issue of repatriation and protection of grave sites. For example, the North Dakota State Historical Society recently developed a policy to return skeletal specimens in its collection to the tribes in North Dakota. Unfortunately, this return was aborted when the National Park Service threatened to take the entire collection of the State Society back under the authority of the Antiquities Act if the Society actually returned any remains in its collection to the tribes. As a result, the North Dakota Historical Society recanted on its offer and the situation will probably result in lengthy and protracted litigation. The Alaska and California State Legislatures have passed resolutions in support of Native claims to remains within the Smithsonian collection and other institutions.

Tribal requests for the return of skeletal remains from collections and other objects are related to objects which have been clearly identified as being those of their tribal members and ancestors. The Committee notes that Indian tribes are, by and large, not able to pursue claims to items in museums on an even footing with the museums who are resisting these claims. The museums are in possession of the accession records which document, to the extent that it is known, the pertinent information about items in their collection and have asserted ownership. When the pertinent information is not available to the tribes, it is difficult for the tribes to ascertain the validity of their claims and the details under which an item was acquired.

The Committee view on this matter is that tribes should be able to claim skeletal remains which are clearly identified as the members or ancestors of the tribe, unless the museum can clearly demonstrate that the remains were acquired with the permission of the tribe, family or individual descendent involved. The Committee does not believe that tribes should be able to claim skeletal remains when identification by tribal affiliation is unclear or when the museum can document that the graves from whence such remains were taken were disturbed with the consent of the tribe or family of the individual which had the authority, under common law as it pertains to sepulchure, to authorize the disturbance of graves.

The museum community and professional organizations which have an interest in permanent curation are opposed to the legislation. The scientific disciplines with an interest in studying human skeletal remains assert that it is critical to maintain such collections for future scientific study and analysis and cite the difficulty which they would face in obtaining similar specimens in the future. On the other hand, the museum community has acknowledged the necessity of responding to tribal demands for repatriation and has volunteered to facilitate a dialogue between tribes and museums to develop recommendations for addressing the conflict. The Committee would encourage this activity, provided that the tribes wish to participate and have an equal opportunity to frame the agenda for such a dialogue and development of recommendations. The Committee does not, however subscribe to the

view that the legislation is unnecessary, but in fact believes that the legislation will facilitate an orderly and timely resolution to disputes between tribes and museums.

The Committee believes that the bill will provide a workable framework to promote the timely and consistent resolution of these disputes. The Committee notes three critical elements of the bill:

1. The bill encourages, and, indeed, requires that Native Americans attempt to achieve local resolution of disputes before a claim can be filed with the Commission. The Committee believes that it is possible for museums and tribes to negotiate agreements to resolve disputes and hopes that the legislation will prompt negotiation in these areas thereby obviating the need for the claims process. In the face of museum resistance to repatriation claims and in the absence of a Federal law to promote repatriation where it is warranted, the Committee believes that the recourse available to the tribes and museums is litigation which many tribes cannot afford.

2. The bill does not require the return of objects unless the evidence disclosed in the investigation of a claim substantiates the tribal claim and it is determined that the museum cannot demonstrate evidence that the object(s) were acquired with the consent of the tribe or the individual member of such tribe who had the authority to consent that such item be acquired by a museum. Where factual evidence discloses overlapping aboriginal territories between or among tribal bands, the Commission is empowered to consider claims from one of the bands which resided in that territory at the time the remains were to have been buried.

3. The Commission would not have authority to entertain claims against collections owned by individuals.

Section 3(5) defines term "museum" as meaning an institution which possesses or has control over skeletel remains, ceremonial objects or grave goods. Section 9(d) specifically exludes from the application of the Act any skeletal remains, ceremonial objects or grave goods owned by the individual collectors. It is the intent of the committee that the provisions of this Act will not apply to such individually owned objects, even if such objects have been placed with a museum or other institution on loan basis, whether such be temporary or permanent. However, the Committee believes that the Commission should carefully review circumstances of a "permanent" loan to insure that the use of such loan is not utilized to circumvent potential claims under the provision of the Act.

The bill would establish a remedial procedure to allow Native Americans to reclaim the remains of their families, bands and tribes which have been acquired by museums and other institutions. However, the Commission would not accept claims unless claimants demonstrate that local resolution of a dispute cannot be achieved. When a claim is filed with the Commission, the first step would be to attempt to negotiate a voluntary settlement of the dispute. If this could not be achieved, the Commission would utilize its authority to resolve the claim by conducting an investigation of the facts and issuing orders based on the evidence disclosed. Hearings would be conducted on preliminary orders to provide parties subject to an order to present additional views and evidence on the cases subject to such an order. The Commission would also have the authority to levy fines for noncompliance with Commisson

orders. Final Commission orders and fines could be appealed to the Federal district courts.

The Commission is directed to issue final orders based on the evidence and facts disclosed in investigation of claims which would be conducted by experts and consultants who have the requisite knowledge to advise the commission on particular claims, but who do not have a personal interest in the claim in question. The Committee believes that there are several legal principles which should guide the Commission in considering claims—

1. Museums have no legal interest in asserting ownership to stolen objects or to objects taken from Indians against their will or without their consent.

2. American common law rights in dead bodies is summarized in Jackson, *The Law of Cadavars*, (Prentice-Hall, 2d, Ed. 1950) at 142–43 as follows: a) the person in possession of the body holds the same *in trust* for those charged with the duty of burial or privilege to exercise the right thereof; b) the person charged with the privilege thereof is entitled to the possession of the body for the purpose of interment; c) such person is entitled to possession in such manner as not to delay, impede, or prevent interment; d) such person is entitled to the body in the same condition it was in when death occurred; e) after interment, next of kin are entitled to have the body remain undisturbed except for a proper and legally authorized reason.

3. Where remains and grave goods are reasonably identifiable in origin as to a present day Indian tribe or other native group, that tribe or group has the paramount right to control the disposition of the remains or grave goods under American common law as the nearest of kin.

4. As an evidentiary matter, appropriate weight must be given to tribal oral traditions, and to traditional Native religious cultural practices or beliefs, regarding relevant ownership, burial and mortuary, and descent and distribution issues, where such body of traditions, laws, customs or practices controlled at the time the sacred object left Native hands or was interred by Native next of kin. *See, e.g.,* AIRFA Report at 64, 76, 81.

5. In resolving ownership of artifact issues, the burden of proof should rest upon the non-Indian party in possession, whenever the Native claimant makes out a presumption of title in himself from the fact of previous possession or ownership. *Sec, e.g.,* 25 U.S.C. Sec. 194. A purchaser of property acquires no title where the seller has none to convey. Thus, museums have no legal interest in asserting ownership to stolen objects or to objects taken from Indians against their will or without their consent. *Id.* at 444–45. *See also,* 18 U.S.C. Sec. 1163.

6. "Grave goods" interred for use in the spiritual hereafter rightfully belong to the descendant tribes, if they be known, when and if removed, for such disposition as the tribes deem proper. *Charrier* v. *Bell,* 496 So. 2nd 601 (La. App. 1st. Cir. 1986), *cert. denied,* 498 So. 2nd 753 (La. 1986).

The Committee also intends that certain ceremonial objects shall be subject to claims for repatriation under the Commission. The Committee understands that certain objects are essential to the conduct of Native American religious ceremony and ritual prac-

ticed by the tribe as a whole or by individual members of a tribe or Native Hawaiian group. The definition of ceremonial object in the legislation is designed to be very narrow to include only those objects which once were utilized for religious purposes and which are necessary for the on-going conduct of religious activities, or necessary to reinstitute a particular religious ceremony. The Committee believes that ceremonial objects should be returned to tribes when it is demonstrated that the object in question is critical for the on-going practice of religious ceremony and ritual; i.e., when no suitable substitute exists. When ceremonial objects are repatriated by the Commission, the Committee believes it would be appropriate to allow the museum to replicate the item in question.

LEGISLATIVE HISTORY

Senator Melcher introduced S. 187 on January 6, 1987. The Select Committee on Indian Affairs conducted a hearing on the bill on February 20, 1987. In response to recommendations made at the hearing and from other sources, Senator Melcher developed an amendment in the nature of a substitute which was introduced in May, 1988. The Committee conducted a hearing on the substitute amendment on July 29, 1988. There is no companion bill in the House.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

The Select Committee on Indian Affairs, in open business session on September 23, 1988, by unanimous vote and with a quroum present, recommends that the Senate pass S. 187, with an amendment in the nature of substitute.

SECTION-BY-SECTION ANALYSIS

Section 1. Title

Native American Museum Claims Commission Act.

Section 2. Findings

Congress finds that museums have collected extensive collections of Native American artifacts which include human skeletal remains, ceremonial objects and grave goods; that disputes exist between museums and Native Americans over the right to possess such objects; that possession of these objects is critical to Native American religion; and that no process exists to adjudicate such disputes.

Section 3. Definitions

This section defines the following terms:

"repatriation" (the formal process of removing an object from a museum collection and returning it to the group from which it originated).

"Native Ameican" (Indians, Alaskan Natives, and Native Hawaiians).

"Indian Tribe" (the standard federal definition)

"Museum" (includes any museum, university, Federal agency, or other institution).

"Ceremonial object" (any object which is or has been utilized for a religious ceremony and which is necessary for the ongoing religious ceremonies.)

"Grave Goods" (any objects which were found in or exhumed from a Native American grave.)

"Commission" (the Native American Claims Commission established in this Act.)

Section 4. Commission

Establishes the Commission as an independent agency composed of five members appointed by the President and confirmed by the Senate; establishes the primary office of the Commission in Washington, D.C.; requires two members to be Native American and two to be members of the scientific community and one member affiliated with neither group; establishes four year, staggered terms; provides for the filling of vacancies in the same manner as the original appointment; establishes quorum requirements; requires the selection of a Chairman and vice-chairman; requires meetings at least once every four months; sets the reimbursement for Commission members while on duty and authorizes payment of travel and expenses for Commission members.

Section 5. Commission authorities

Provides for an Executive Director and General Counsel to be appointed by the Chairman paid at GS-18 rate. Authorizes the Executive Director to appoint other staff as necessary to carry out the Commission activities; requires the application of Indian preference for Commission staff; authorizes the Chairman to secure temporary consultant services; authorizes the Chairman to request details of personnel from other agencies; to secure information from other agencies; authorizes the Commission to use the mails as a Federal agency; procure supplies and services by contract; to hold hearings and administer oaths to enter into agreements with General Services Administration;

Section 6. Authorities of the General Counsel

Outlines the authorities of the General Counsel to include: appointing other attorneys; representing the Commission in courts of law; overseeing investigations; submitting evidence; proposing findings of facts and recommendations for Commission orders;

Section 7. Commission functions

To receive, consider and determine facts relative to claims filed with the Commission; to facilitate negotiated agreements of claims; to issue orders regarding the right to possess objects to claims filed with the Commission, including interim relief; to adopt an annual budget and to prepare and submit annual reports to Congress.

Section 8. Authorizes appropriations for the Commission

Section 9. Filing claims

Authorizes the governing body of Indian tribes, or consortia of tribes or the Office of Native Hawaiian Affairs to file claims with the Commission regarding the right to possess objects in the follow-

ing categories: human skeletal remains; ceremonial objects and grave goods; allows the Commission to consider claims regardless of the statute of limitations; requires claimants to attempt local resolution of disputes prior to filing a claim with the Commission.

Section 10.

Requires the Commission to attempt to negotiate a voluntary settlement of any claims which are filed.

Section 11.

Requires Commission certification of voluntary settlements reached as a result of the Commission's intervention.

Section 12.

Requires the Commission to take further action to resolve claims if a voluntary settlement is not achieved in 120 days after the filing of a claim.

Section 13. Investigation of Claims

Requires the Commission to utilize expert consultants to investigate and render findings and recommendations on the full facts pertaining to any particular case for Commission consideration.

Section 14. Subpoenas

The Chairman of the Commission to issue and enforce subpoenas under the rules of standard rules of procedure and to reimburse witnesses.

Section 15. Preliminary orders

Requires the Commission to issue preliminary orders, based upon facts disclosed in any investigation, which determine which party to the dispute has the right to possess objects subject to a claim.

Section 16. Dismissal of Claims

Requires the Commission to dismiss claims which are not supported by evidence disclosed in any investigation.

Section 17. Conditions for repatriation order

Requires the Commission to incorporate conditions on any preliminary order of repatriation which will guard against future loss or alienation and for historical preservation.

Section 18.

Requires the Commission to submit a copy of any preliminary order to the parties within 30 days.

Section 19.

Requires the Commission to conduct a hearing to consider objections to any preliminary order upon the request of either party subject to a preliminary order.

Section 20.

Requires the Commission to issue a final order to resolve a claim within 30 days of any hearing held under section 19 and to send

copies of final orders by certified mail to both parties subject to the order.

Section 21. Noncompliance and fines

Requires the Commission to issue notices of noncompliance to any party found not to be complying any final order of the Commission and to levy fines up to $500 per day for each day of noncompliance for which the Commission determines there is no just cause.

Section 22.

Requires orders of noncompliance to be issued by certified mail.

Section 23. Appeals

Provides for appeal of final Commission decisions under the Administrative Procedures Act which may be appealed in Federal district court.

Section 24. Relief from fines

Clarifies that parties assessed fines by the Commission may seek judicial review and relief in Federal district court.

Section 25. Collection of fines

Authorizes the Commission to request the Attorney General to institute actions to collect fines which are not paid.

Section 26. Repatriation authority

Clarifies that the Commission has the authority to issue orders of repatriation notwithstanding other laws.

Section 27. Severability Clause.

COST AND BUDGET CONSIDERATIONS

The cost estimate or S. 187, as amended, as evaluated by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 30, 1988.

Hon. DANIEL K. INOUYE,
Chairman, Select Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 187, the Native American Museum Claims Commission Act, as ordered reported by the Senate Select Committee on Indian Affairs on September 29, 1988. We estimate that enactment of this bill would cost from $1 million to $3 million per year, assuming appropriation of necessary funds.

S. 187 authorizes the establishment of an independent agency, to be known as the Native American Claims Commission, to oversee and resolve disputes which arise when Native Americans claim skeletal remains, ceremonial artifacts or grave goods held by a museum or other institution. According to the bill, the Commission shall consist of five voting members who shall meet at least once

every four months. In addition, an Executive Director and General Counsel shall be appointed by the Chairman of the Commission. We understand that the Executive Director and the General Counsel would serve as full time employees and that the Executive Director would appoint a staff of unspecified size to help supervise the daily administration of Commission activities. The General Counsel is also authorized to appoint such other attorneys as is deemed necessary. When a claim is filed with the Commission, the Commission must encourage and attempt to negotiate a voluntary settlement of the dispute for a period of 120 days. In the event that a negotiated settlement cannot be reached, the Commission is authorized to conduct an investigation in order to resolve the situation. Independent consultants with the requisite expertise are to be hired to weigh the evidence and advise the Commission on a ruling.

CBO estimates that approximately $1 million in costs would be incurred as a result of the administrative functions of the Commission in any given year. This $1 million would cover such expenses as staff salaries, travel, and overhead. Any costs above the administrative expenses of the Commission would depend on a variety of factors including 1) the number of claims made per year by Indian tribes, and 2) the cost of an investigation in the event that a negotiated settlement cannot be reached.

Based on discussions with the staff of the Select Committee on Indian Affairs and the Smithsonian Institute, it is apparent that there is no way to estimate the number of claims that will be made by Indian tribes in any given year. In like fashion, due to variables such as consultant fees and the length of time an investigation may take, there is no way to estimate how much one of these investigations might cost. However, the structure of the Commission authorized in this bill would be very similar to that of the Indian Claims Commission which expired in 1978. Therefore, the CBO cost estimate for the Native American Claims Commission is based on the costs of the Indian Claims Commission. The expenses of the old Indian Claims Commission indicate that the costs arising from a combination of these factors could range anywhere from $1 million to $2 million.

CBO estimates that no costs would be incurred by state or local governments as a result of enactment of this bill.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Michael Namian.

Sincerely,

JAMES L. BLUM, *Acting Director.*

REGULATORY IMPACT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 178, as amended will have a minimal impact on regulatory or paperwork requirements.

EXECUTIVE COMMUNICATIONS

The Committee received the following letter from the U.S. Department of Justice giving the Administration's views on S. 187.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF THE ASSISTANT ATTORNEY GENERAL,
Washington, DC, September 7, 1988.

Hon. DANIEL K. INOUYE,
Chairman, Select Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR SENATOR INOUYE: This letter presents the views of the Department of Justice on S. 187, the "Native American Museum Claims Commission Act." The purpose of the bill is evidently to facilitate the resolution of disputes which arise when Native Americans claim skeletal remains, ceremonial artifacts, or grave goods held by museums. *E.g.*, Section 2(g). As presently drafted, the bill presents significant constitutional problems.

The bill would create a "Native American Museum Claims Commission," the members of which are to be appointed by the President with the advice and consent of the Senate. Section 4(a). At least one of the Commission members is to be a native American. Section 4(b). Members serve staggered four year terms, and may be removed for "just cause," following a hearing by the Commission and with the concurrence of a majority of the Commission's members. Sections 4(f) and (h). The Commission is to receive claims involving remains, artifacts or grave goods, to facilitate negotiated settlements of such claims if possible, and to issue orders of the right to possess such items. Section 7. A decision of the Commission is subject to review as final agency action in the federal courts, although such review is to be conducted on the record made before the Commission and the Commission's action is to be sustained if it is supported by substantial evidence on the record considered as a whole. Sections 22 and 23. The Commission is also authorized to be represented through its own General Counsel in courts of law "whenever appropriate." Section 6(b).

The bill does not specify whether the Commission is to adjudicate rights under federal or state law. We believe that the rights at issue here are most likely to be rights governed by state law. The only federal adjudicatory bodies that may resolve state law questions, however, are those contemplated by Article III of the Constitution. *E.g., Northern Pipeline Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 84 (1982) (Congress' authority to relegate adjudication of state law claims to non-Article III courts is "at a minimum."). The Commission is not an Article III court, because it lacks the determinative attribute of life tenure for its members. See *Northern Pipeline, supra*, 458 U.S. at 59. We do not believe that the limited review of the Commission's decisions afforded in the Article III district court under Sections 22 and 23 of the bill is sufficient to render this provision of the bill constitutional. See *Northern Pipeline, supra*, 458 U.S. at 91 Rehnquist, J., concurring).

On the other hand, were the Commission's authority to be deemed to extend only to federal rights, the bill would pose a different, but equally disabling, constitutional problem. The bill pro-

vides no federal rule of decision for the Commission to apply in resolving the claims that come before it: rather, the Commission is simply directed to "issue orders of the right to possess items which are the subject of such claims involving Native American skeletal remain(s), ceremonial artifact(s) or grave good(s) filed with the Commission," in accordance with "the facts disclosed in the investigation." *E.g.*, Sections 7 and 16. Nothing in the bill, however, suggests what "facts" are necessary to support such a determination.[1] Although we recognize that Congress had broad discretion to delegate, this type of "standardless delegation" of legislative authority raises substantial constitutional concerns. *Schechter Poultry Corp.* v. *United States,* 295 U.S. 495 (1935); see also *Industrial Union Department* v. *American Petroleum Institute,* 448 U.S. 607, 675 (1980) (Rehnquist, J., concurring); *National Cable Television Ass'n* v. *United States,* 415 U.S. 336, 342 (974).[2]

The requirement of Section 4(h) that the majority of the Commission consent before any of its members can be removed, even for cause, is also inconsistent with the President's authority as head of a unitary executive branch. *Myers* v. *United States,* 272 U.S. 52, 162-64, 177 (1926). Although the Supreme Court has recognized that Congress in certain circumscribed cases may limit the President's removal power by imposing a "for cause" requirement, such limitations may not be such as to "impede the President's ability to perform his constitutional duty" to "take care that the laws be faithfully executed." *Morrison* v. *Olson,* 56 U.S.L.W. 4835, 4844-45 (1988). No Supreme Court decision has ever suggested that the President's power to remove his appointee from a commission may be conditioned upon the concurrence of the other members of the commission. Indeed, denying the President any direct removal authority over the members of the Commission, even in those instances where Commissioners may behave illegally, manifestly provides no means for the President to ensure the "faithful execution" of the laws. Accordingly, Section 4(h) violates the Constitution.

We also object to the requirement in Section 4(c) that one member of the Commission be a Native American. To the extent that the term "Native American" is defined in Section 3 of the proposed bill on the basis of racial, as opposed to tribal, classifications, the requirement may well be unconstitutional. *Morton* v. *Mancari,* 417 U.S. 535 (1974). In *Mancari,* the Supreme Court upheld the Indian preference contained in the Indian Reorganization Act of 1934 against a limited constitutional challenge, largely on the ground that the implementing regulations at issue created a tribal or political, rather than a racial, classification. *Id.* at 554 and 553 n. 24. Here, the definitions contained in the bill appear to exceed the carefully drawn line established by the Court in *Mancari.* Moreover, even if this racial classification were constitutional, the

[1] Nor, to our knowledge, is there any other federal statute or regulation that would provide an appropriate rule of decision as to the property rights in such remains and artifacts.

[2] Moreover, if a federal rule of decision were to be applied by the Commission, and if Section 7 of the bill were interpreted to permit the Commission to order the transfer of the remains and artifacts without regard to preexisting legal rights, we believe the bill would result in takings of private property without just compensation, in violation of the Fifth Amendment. See also *Hughes* v. *Washington,* 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring). Such takings could result in a negative financial impact on the public fisc, were the courts to award just compensation to the museums.

provision would still be objectionable, because it limits the President's authority to appoint his principal officers. The only check on this authority recognized in the text of the Constitution is the Senate's prerogative to reject such appointments through refusal to give advice and consent. U.S. Const., art. II, § 2. cl. 2.

We also object to the provision in the bill that the Commission be represented in court by its own General Counsel "whenever appropriate," Section 6(b). We believe that it is important to centralize control of litigation on behalf of the executive branch in the hands of the Attorney General. Such centralization not only reflects the constitutional concept of the unitary executive, but also helps the executive to maintain consistent litigating positions in the numerous law suits to which the government is a party, and facilitates presidential supervision over executive branch policies that are implicated in litigation.

Were the bill in its present form to be presented to the President for his signature, the Department would strongly urge that it be disapproved.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report and that S. 187 would not be in accord with the President's program.

Sincerely,

THOMAS M. BOYD,
Acting Assistant Attorney General.

CONGRESSIONAL RESEARCH OPINION

Chairman Inouye requested the American Law Division of the Congressional Research Service to provide the Committee with its views on the Department of Justice letter which follows:

CONGRESSIONAL RESEARCH SERVICE,
THE LIBRARY OF CONGRESS,
Washington, DC, September 7, 1988.

To: Honorable Daniel K. Inouye, Chairman, Select Committee on Indian Affairs Attention: Clara Spotted Elk.
From: American Law Division.
Subject: Comments on Justice Department's Legal Objections to S. 187, the Native American Museum Claims Commission Act.

The substitute amendment for S. 187, the Native American Museum Claims Commission Act, introduced by Senator Melcher, would establish an independent federal agency, the Native American Museum Claims Commission (Commission), to facilitate the resolution of disputes arising out of claims of Native Americans to human skeletal remains, ceremonial artifacts, and grave goods held by museums or other institutions which are necessary for the proper observance of Native American religion. The Commission would be composed of three members appointed by the President with the advice and consent of the Senate for staggered four year terms. A member may be removed for "just cause" following a hearing by the Commission and the concurrence of a majority of the Members. One of the three members must be an Indian."

The Commission is empowered to receive claims for repatriation of religious ceremonial objects, attempt to achieve negotiated voluntary settlements, and investigate and adjudicate disputed claims

where negotiation fails. A preliminary determination and order of repatriation may be appealed to the Commission which must hold a hearing on the record to provide an opportunity for affected parties to contest the issuance of a final order. Final orders may be appealed to a federal district court which must sustain the Commission's findings of facts if supported by substantial evidence on the record considered as a whole. The General Counsel of the Commission is authorized to represent the agency in courts of law where appropriate, except that civil actions for the collection of fines imposed for failure to obey final Commission orders is placed in the hands of the Attorney General.

In a letter to Senator Melcher dated August 2, 1988, Acting Assistant Attorney General Thomas M. Boyd, Office of Legislative Affairs, Department of Justice, raises several constitutional and policy objections to the proposed legislation: (1) Empowering the Commission to adjudicate state law claims violates the separation of powers doctrine in that Article III only permits such adjudications in federal adjudicatory bodies which secure life tenure to its members; (2) Even if the Commission's authority is deemed to extend only to federal claims, the legislation provides no standard to guide the agency's decisionmaking and is thus an unlawful delegates to legislative authority; (3) the inability of the President to remove a Commission member for cause without the concurrence of a majority of the members unduly interferes with the President's duty under the Constitution to "take care" that the laws be faithfully executed; (4) the requirement that one member of the Commission be an Indian is an unconstitutional racial classification; and (5) authorizing the Commission's General Counsel to represent the agency in court "whenever appropriate" detracts from the centralizing role of Attorney General in government litigation. We conclude that with the exception of number (3) dealing with the limitation on the President's removal power, it would appear that the Justice Department's constitutional objections lack substantial legal support; and that statutory precedent supports investing independent litigation authority in agencies like the Commission.

1. Separation of Powers

The Justice Department's objection that adjudication of the claims involved here by a federal body is precluded by the Article III requirement that such bodies must provide life tenure to its members is supported only by the unexplicated citation to the Supreme Court's decision in *Northern Pipeline Co.,* v. *Marathon Pipe Line Co.,* 458 U.S. 50 (1982). But close analysis reveals that the proposition for which the *Northern Pipeline* ruling is cited is arguably inapplicable to the current situation and its formalistic approach is incompatible with a large body of case law decided prior and subsequent to it. It is also in apparent conflict with almost two centuries of congressional practice establishing such bodies.

The first line of cases that may be seen as incompatible with the Justice Department thesis involves so-called "legislative courts"—adjudicative bodies created by Congress under Article I and not bound by Article III's guarantee that federal judges enjoy life tenure and protection against reduction in salary. The constitutionality of legislative courts was initially sustained in *American Insur-*

ance Co. v. *Canter,* 26 U.S. (1 Pet.) 511 (1828), a Supreme Court decision in which Chief Justice Marshall held that Congress may create non-Article III courts to adjudicate disputes in federal territories. Since that time the *Canter* holding has been found not to be confined to federal territories and similar enclaves such as the District of Columbia. The Supreme Court has ratified the use of commissioned officers, who are unprotected by life tenure, to preside over courts martial, *U.S. ex rel. Toth* v. *Quarles,* 350 U.S. 11, 17 (1955), the Court of Claims, *Williams* v. *U.S.,* 289 U.S. 553 (1933), and a court of customs and patent appeals, *Ex parte Bakelite Corp.,* 279 U.S. 478 (1929). Congress has also created a federal tax court, 26 U.S.C. 7441 (1982) and a court of private land claims, based on this jurisprudence.

Another important line of cases rejecting a literal approach to Article III involves administrative entities established by Congress to administer schemes of federal regulation. Such agencies typically are vested with adjudicatory functions. The seminal case legitimating the role of the modern administrative agency is *Crowell* v. *Benson,* 285 U.S. 22 (1932). There the Court upheld Congress' decision to vest responsibility for deciding cases under the Longshoremen's and Harbor Workers' Compensation Act in an administrative agency, following the aforenoted legislative court precedents. The Court also acknowledged a distinction between public rights and private rights. It noted that public rights dispute may not require judicial decision at either the original or appellate level. 285 U.S. at 50–51. But the Court went further and held that even in private rights cases an administrative tribunal may make findings of fact and render an initial decision of legal and constitutional questions as long as there is adequate review in a constitutional court. *Id.* at 51–65. For the use of administrative decisionmakers to be permissible in a private rights case, the Court held that the "essential attributes" of the judicial decision must remain in an Article III enforcement court, *id.* at 50, with the administrative agency or other non-Article III adjudicator functioning less as an independent decisionmaker than as an adjunct to the court. *Id.* at 51. Thus *Crowell* permitted significant inroads into traditional conceptions of the necessary role of Article III courts. For present purposes, *Crowell* is also notable because it found Article III to be satisfied by a review of the agency's factfinding only upon the administrative record. *Id.* at 63–65.

Northern Pipeline, decided in 1982, appears to have reflected a temporary change of thinking, though not an overruling, of some aspects of *Crowell.* In *Northern Pipeline,* the Court held unconstitutional the jurisdiction given to non-Article III bankruptcy judges under the Bankruptcy Act of 1978. Justice Brennan, speaking for a plurality of the Court, held that by creating federal adjudicative bodies other than Article III courts, Congress threatened to subvert the role of the federal courts in the tripartite constitutional scheme and thereby upset the separation of powers needed to protect fundamental liberties. 458 U.S. at 73–74. The plurality recognized that historically Article III's literal injunction had not been followed and accepted certain "historical exceptions" that would continue to be allowed: territorial courts, military tribunals and non-Article III adjudicators of public rights cases. *Id.* at 63–76. The plurality also

recognized an exception based on the *Crowell* line of cases: Congress could constitute agencies as an "adjunct" to federal courts, but only insofar as the "essential attributes" of even initial decisionmaking remain in an Article III tribunal. *Id.* at 76–81.

Concurring Justices Rehnquist and O'Connor, while apparently sharing in many of the plurality's assumptions, restricted their holding to the statutory scheme before them, emphasizing that they were skeptical of the utility of General principles in this area of the law. *Id.* at 90–91. In dissent, Justice White, for himself and Chief Justice Burger and Justice Powell, argued that the constitutionality of legislative courts and administrative agencies ought to be determined under a balancing test. He saw no principled distinction between the historical exceptions noted by the plurality and other cases in which Congress had wished to employ non-Article III tribunals. Under the circumstances, he concluded, the best approach would be to weigh Article III values against the practical and constitutional arguments supporting reliance on a non-Article III adjudicator. *Id.* at 92, 113–116.

The Court has since eschewed *Northern Pipeline's* formalistic approach in cases dealing with agencies vested with adjudicatory tasks and adopted Justice White's balancing methodology. Thus, in *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), the Court upheld a regulatory scheme which allowed arbitrators to make final decisions with respect to compensation claims arising out of Environmental Protection Agency decisions approving registration of pesticides on the basis of data submitted by an earlier registrant. The arbitrator's decision was subject to review by a Article III court only for "fraud, misrepresentation, or other misconduct." Justice O'Connor writing for the majority emphasized that the lead opinion in *Northern Pipeline* represented the views of only a plurality and that that opinion had taken a too categorical approach. 473 U.S. at 585–587. "Substance", Justice O'Connor stated, must prevail over "formal categories". *Id.* at 587. The Justice cited approvingly Congress' reasons for creating this particular scheme and listed several factors that alleviated concerns of unfairness to the parties. *Id.* 592–593. In addition, becuase no court would be required to enforce the administrative judgment, the Court found the danger of encroachment on the traditional prerogatives of the Article III courts was "at a minimum". *Id.* at 591. The Court placed weight on the statutory provision for judicial review, even though that review was quite circumscribed. *Id.* at 592–593. Finally, the Court's analysis strongly suggests that when Congress has created a substantive right, it should enjoy considerable flexibility to prescribe the mode of enforcement. *Id.* at 589–590, 593–594.

Thomas' balancing test was followed and elaborated in *Commodity Futures Trading Commission* v. *Schor,* 106 S. Ct. 3245 (1986), decided the same day as *Bowsher* v. *Synar,* 106 S. Ct. 3181 (1986). In *Schor* the question before the Court was whether the grant of statutory authority to the commission—an independent regulatory agency—to entertain state law counterclaims in reparation proceedings violated article III of the Constitution. The Court held it did not in language and reasoning that appears to lend strong implicit support to the adjudicatory scheme here in question. It rejected the adoption of "formalistic and unbending rules" in determin-

ing whether the congressional assignment of Article III adjudicatory business to a non-Article III tribunal raised separation of powers problems. "Although such rules might lend a degree of coherence to this area of law, they also might unduly constrict Congress' ability to take needed and innovative action pursuant to its Article I powers." 106 S. Ct. at 3258. The Court noted that it weighed a variety of factors in coming to its conclusion, "with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary." *Id.* In this case the Court held that "any intrusion . . . can only be deemed *de minimis.*" *Id.* at 3620. The congressional addition to the CFTC's adjudicatory powers made a departure from "the traditional agency model" only with respect to its jurisdiction over common law counterclaims, thus giving it "little practical reason to find that this single deviation from the agency model is fatal to the congressional scheme." *Id.* at 3258. Finally, the Court took note of its decision that day in *Bowsher,* distinguishing it as follows:

> ". . . Unlike *Bowsher,* this case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch. Instead, the separation of powers question presented in this case is whether Congress impermissibly undermined, without appreciable expansion of its own powers, the role of the Judicial Branch. In any case, we have, consistent with *Bowsher,* looked to a number of factors in evaluating the extent to which the congressional scheme endangers the separation of powers principles under the circumstances presented, but have found no genuine threat to be present in this case. *Id.* at 3261.

In sum, then, the foregoing review of the relevant case law indicates that the scheme of the proposed legislation is far from foreclosed by *Northern Pipeline* and that, indeed, the vitality of that plurality is in question. The *Thomas* and *Schor* cases indicate that the Court will a flexible approach in this area. Where state law claims are implicated the Court will weigh the intrusive effects on Article III values against the advantages of a congressional scheme designed to accomplish a legitimate Article I goal in an efficient and expeditious manner. Where that scheme includes ultimate review by an Article III court, however narrow, it is likely to be upheld. But if the scheme involves adjudication of a federally created substantive right—a "public right"—the courts will follow *Crowell* and its progeny and uphold it even without a provision for judicial review.

Under the present circumstances, it would appear likely that a court would uphold the proposed legislation if it were deemed a scheme for adjudication of state law claims, particularly in view of the judicial review provision. However, as is explained next, it seems clear that this issue need not be reached since it is apparent that Congress intends to create a substantive federal right.

2. Creation of a Federal right

The proposed bill would, on its face, appear to intend to create a new federal right and not simply to create a federal forum for adjudication of state causes of action. Thus, in Section 2, a findings preamble, Congress notes that it has recognized "that it is the policy

of the United States to protect Native American religious practices and beliefs" in the American Indian Religious Freedom Act, Pub. L. 95-341, 42 U.S.C. 1996 (1982), but that presently "there is no *Federal* law to facilitate the resolution of disputes which arise when Native Americans claim skeletal remain[s], ceremonial artifact[s] or grave good[s] held by a museum or other institution." [Emphasis added.] The reference to the earlier unenforceable congressional declaration and the admission that no federal right of action exists to resolve repatriation disputes, is a strong indication that a federal right is being created. This is buttressed by the legislation's preemption of any statute of limitations that might be applicable: "The Commission may hear any and all claims described in this section notwithstanding any statute of limitations or laches." (Section 9(b)). Since, as indicated, there has been an acknowledgement that there is presently no federal right of action, this language can only be aimed at state limitation on such actions. Finally, the bill particularizes and defines who may make a claim for repatriation, what may be repatriated, and the elements necessary to sustain a claim for repatriation. (Section 3, 9(a)). Such detail is the essence of the creation of a formal right. As such, the adjudicatory scheme proposed to resolve disputes raised by the assertion of the right would appear to be covered squarely by the line of precedents that start with *Crowell* and is not subject to serious constitutional question.

3. Undue delegation

The Justice Department contends that even if a federal right were intended, the bill provides no appropriate standard to guide the Commission's determinations. This contention appears to misapprehend the current judicial understanding of the delegation doctrine and to ignore the provisions of the proposed bill.

In order to withstand constitutional scrutiny, delegations of power by Congress to the President or other administrative officials are required to be accompanied by sufficient standards so as to assure adequate control and accountability in the exercise of official power. In its contemporary application, the courts appear to understand the delegation doctrine as requiring a careful examination of the total system of controls, both substantive and procedural, which limit the exercise of delegated power. Thus the courts will scrutinize a statutory scheme to ascertain whether it provides adequate means by which the public, Congress, and reviewing courts can check an agency's exercise of discretion. As a consequence, since 1937, courts have consistently upheld broad delegations of power by being willing to infer standards to guide delegates even where none has been supplied by the legislature. In these cases the courts have found the standards in the enactment's legislative history, in agency practice, or in past governmental experience in the area. *See,* e.g., *Yakus* v. *United States,* 321 U.S. 414 (1944); *Amalgamated Meatcutters* v. *Connally,* 337 F.Supp. 737 (D.D.C. 1971) (3-judge court).

The most comprehensive recent contemporary judicial explanation of the doctrine is contained in *Synar* v. *United States,* 626 F.Supp. 1374 (D.D.C. 1986) (3-judge court), a decision finding the Gramm-Rudman-Hollings deficit reduction scheme unconstitutional

but which rejected a claim of undue delegation. The *Synar* opinion briefly explores the history of the delegation doctrine, noting that since 1935 the High Court has consistently rejected delegation challenges and that though it has nominally applied the tests enunciated in *Panama Oil Co.* v. *Ryan,* 293 U.S. 388 (1935), and *Schechter Poultry Corp.* v. *United States,* 295 U.S. 495 (1935), requiring intelligible standards to guide the delegate, "[p]ragmatically . . . the Court's decisions display a much greater deference to Congress' power to delegate." 626 F.Supp. at 1384. But the court refused to concede the demise of the doctrine and proceeded on the assumption that the delegation doctrine remains valid law, but that its scope must be determined on the basis of the deferential post-*Schechter* cases decided by the Supreme Court." *Id.*

The court first dealt with the plaintiffs contention that there were certain nondelegable "core functions" of Congress. The court rejected this "core functions" argument, noting that the Supreme Court has never held any legislative power to be nondelegable due to its "core function" status, much less the power over appropriations. It concluded that the appropriations power is not functionally distinguishable from other powers delegated by Congress, and "is particularly akin to the taxing power" which has been validly delegated, *e.g.,* in tariff cases. 626 F.Supp. at 1385–86.

Next the court upheld the delegation against the attack that it was excessively broad. The authority there conferred, it opined, "seems to us no broader than . . . delegations that have been upheld" in the past. But the court advised that "the ultimate judgment regarding the constitutionality of a delegation must be made not on the basis of the scope of the power alone, but on the basis of its scope *plus* the specificity of the standards governing its exercise. When the scope increases to immense proportions (as in *Schechter*) the standards must be more precise." 626 F.Supp 1386. (emphasis in original). In reviewing the standards contained in the statute, the court found them more than adequate. While it found that "a good deal of judgment" was involved in the exercises of the power delegated, the key for the court, which distinguished the case from other delegation cases, was that "the *only* discretion conferred is in the ascertainment of facts and the prediction of facts." 626 F.Supp. at 1389. Because of this, "[c]ompared with the cases upholding administrative resolution of such issues, the present delegation is remote from legislative abdication." *Id.*

Finally, the court rejected the argument that the delegation is invalid because it permits administrators to "nullify" or "override" existing laws. Advertising to prior Supreme Court rulings upholding delegation which permitted officials to determine when, if ever, a law should take effect, the *Synar* court characterized the Gramm-Rudman-Hollings Act as "a form of contingent legislation." 626 F.Supp. at 1386. Under it, the court reasoned, Congress has stipulated that the effectiveness of appropriations legislation will be contingent upon the administrative determination of whether appropriated funds, measured against revenues, result in a budget deficit larger than the required target figures. From this perspective, the court believed, the Act provided for a contingent delegation that did not differ in kind from those approved in prior cases. *Id.*

The court concluded that the delegation was valid because "hard political choices" has been made by Congress. "All that has been left to administrative discretion is the estimation of the aggregate amount of reductions that will be necessary, in light of predicted revenues and expenditures, and we believe that the Act contains standards adequately confining administrative discretion in making that estimation." 626 F.Supp. at 1391. It is Congress which "has made the policy decisions which constitute the essence of the legislative function." *Id.*

It is highly unlikely that a court would find a delegation doctrine infirmity with this proposed legislation. As has been noted above, the bill spells out with great particularity who can bring a claim, who it may be brought against, what the claim must concern, and what must be proved to sustain a claim. The claimants' burden must be established at a record hearing and a determination and order of repatriation is subject to judicial review of the factual determinations which must be supported by substantial evidence on the record considered as a whole. The scheme, therefore, is highly circumscribed, provides traditional due process procedures including judicial review, and particularly defines the scope of what the Commission may do. The scheme appears well within the bounds permitted by the decided delegation case law.

4. Limitation on President's removal power

Section 4(h) of the substitute amendment for S. 187 requires that a majority of the members of the Commission concur in a presidential decision to remove a member for "just cause". The Justice Department objects that such a limitation on the President's removal power unduly interferes with his duty to "take care" that the laws are faithfully executed. There would appear to be some merit in the objection.

In *Morrison* v. *Olson*, 56 U.S.L.W. 4835 (1988), the High Court reconfirmed Congress' ability to insulate subordinate officials of the United States from at will presidential removal and clarified the scope of that authority. 56 U.S.L.W. at 4844-46. The Court held that the validity of insulating an inferior officer from at will removal by the President does not turn on whether such an officer is performing "purely executive" or "quasi" legislative or judicial functions. Congress may require cause for removal for any inferior officer. The issue raised by a for cause limitation, the majority opinion explained, is whether it interferes with the President's ability to perform his constitutional duty. *Id.* at 4845. It is in that light that the functions of the official in question must be analyzed. In the case before it the Court noted that the independent counsel's prosecutorial powers are executive in that they have "typically" been performed by executive branch officials. But, the Court held, the exercise of prosecutorial discretion is in no way "central" to the functioning of the Executive Branch. Further, since the independent counsel could be removed by the Attorney General, this is sufficient to ensure that she is performing her statutory duties, which is all that is required by the "take care" clause. *Id.* Finally, the limited ability of the President to remove, through the Attorney General, the independent counsel was also seen as leaving enough control in his hands to reject the argument that the

scheme of the Ethics in Government Act impermissibly undermines executive powers or disrupts the proper constitutional balance by preventing the Executive from performing his functions. Although the Court did not define with particularity what would constitute sufficient "cause" for removal, it did indicate that it would at least encompass misconduct in office. *Id.*

Although it has been consistently held that the President derives no substantive authority from the "take care" clause, see, *e.g., Kendall ex rel Stokes* v. *United States,* 37 U.S. (12 Pet.) 524, 610 (1838); *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 587 (1952); *In re Theodore Olson,* 818 F.2d 34 (D.C. Cir. 1987); *Lear Siegler, Inc.* v. *Lehman,* 842 F.2d 1102 (9th Cir. 1988), it is certainly not devoid of meaning and purpose. While it does not create a presidential power so great that it can be used to frustrate congressional intention, it does vest in the President a duty to ensure that officials obey Congress' instructions. See, *e.g.,* 1 Op. Atty Gen. 624, 625–26 (1823) ("The Constitution assigns to Congress the power of designating the duties of particular officers: the President is only required to take care that they execute them faithfully . . . He is not to perform the duty, but to see that the officer assigned by law performs his duty *faithfully*—that is, *honestly:* not with perfect correctness of judgment, but *honestly.*") (Emphasis in original). By effectively giving members of the Commission an absolute veto power over presidential removals, even those deemed by the President to be impelled by official misconduct, the bill would appear to unconstitutionally trench upon the core prerogative of the President under the "take care" clause. Congress could certainly provide for a hearing before removal. Indeed, the due process clause likely requires some sort of hearing, however informal. And the removal decision would be subject to limited judicial review. But the decision itself is the President's. If not, then the clause is bereft of meaning.

As it stands, then, Section 4(h) would appear to be "a case in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the 'faithful execution' of the laws." *Id.* at 4845. However, it should be understood that the requirement of "cause" for presidential removal has been a formidable barrier to such actions. We are aware of no instance of removal of an official protected by a "for cause" removal limitation. Thus, as a practical matter, it seems unnecessary to have an override authority in the Commission to assure against presidential interference. A requirement of some sort of pretermination hearing may add some further insulation and perhaps provide the basis for limited judicial review, but in the end the final executive decision on removal must be the President's.

5. Qualification for office

The Justice Department contests the bill's requirement that one member of the Commission be an Indian on the grounds that (a) it unconstitutionally limits the President's appointment power and (b) it is an unlawful racial classification. We treat these questions in turn.

(a) It is well settled that Congress in legislating pursuant to the powers granted it under Article I, section 8 of the Constitution, as well as powers granted in other parts of the Constitution, has the authority, under the Necessary and Proper Clause, Art. I, sec. 8, cl. 18, to create offices in the Executive branch, provide the method of appointment to those offices, specify the terms and qualifications of persons to be appointed, set compensation, and otherwise regulate the incidents of office in numerous ways. *Buckley* v. *Valeo,* 424 U.S. 1, 138 (1976). Congress' discretion is constrained in that it may not itself appoint officers who perform significant functions under the laws of the United States, *Buckley* v. *Valeo, supra,* or remove such officers, *Myers* v. *United States,* 272 U.S. 52 (1926); *Bowsher* v. *Synar,* 106 S. Ct. 3181 (1986). But as a general matter, the Court has spoken very broadly of the legislative power over offices. Where Congress deals with the structure of an office—its creation, abolition, powers, duties, tenure, compensation and other such incidents—its power is virtually plenary. Only where the object of the exercise of such power is clearly seen in the particular situation as an attempt to effect an unconstitutional purpose, *e.g.,* removal of a particular officer, have the courts felt constrained to intervene. These principles are illustrated by cases involving the abolition of offices prior to the expiration of an incumbent's term, *Crenshaw* v. *United States,* 134 U.S. 99 (1890), the legislative addition of duties and responsibilities to offices without requiring reappointment of the incumbent, *Shoemaker* v. *United States,* 147 U.S. 282 (1893), denial of pay to identifiable office holders, *United States* v. *Lovett,* 328 U.S. 303 (1946), and the abolition and immediate re-creation of offices, *e.g., State ex rel Hammond* v. *Maxfield,* 103 Utah 1, 132 P.2d 660 (1942).

As indicated, as an incident to the establishment of an office Congress has the power to determine the qualifications of the officer and in so doing necessarily limits the range of choice of the appointing power. Since the earliest days of our nation it has laid down a great variety of qualifications for holding office including citizenship, residence, professional attainments, occupational experience, physical handicap, age, property, and such sound habits as a demonstrated temperance in the use of alcohol, among others. It has required that appointees be representatives of a political party, of an industry, of a geographic region, or of a particular branch of government. It has confined the President's selection to a small number of persons to be named by others, thereby virtually usurping the appointing power. See citations collected in *Myers* v. *United States, supra,* 372 U.S. at 240, 265-274 (Brandeis, J., dissenting). See also, L. Mayers, The Federal Service 39, 40-64 (1922); Note, 42 Harv. L.R. 426 (1929); E. Corwin, The President: Office and Powers 1787-1957 (4th ed. 1957) 363-365; and Schwartz, The Powers of Government: The Powers of the President, Volume II, 43-45 (1963).

Some specific historical examples of statutory enactments limiting the choice of the President may be noted. In establishing the original Railway Labor Board in 1920 Congress provided that the President would appoint three members from six nominees named by employees and three from six nominees named by carriers. 41 Stat. 456, 470 (1920). In establishing a commission to sell coal and asphalt deposits in Indian lands, two members of the commission

were required to be Indians. 32 Stat. 641, 654 (1902). In establishing a Women's Bureau in the Department of Labor, Congress required that the director of the Bureau be a woman. The Civil Service Act of 1883 left the appointing officer the right to select from "among those graded highest on the result of" the competitive examinations for which the act provides, and executive orders and amendatory legislation have customarily restricted choice to the three highest. See, e.g., 5 U.S.C. 3317 (1982). Section 10 of the original Federal Reserve Act established a five member Board to be appointed by the President, no more than one of whom could be from any single Federal Reserve district, and at least two of whom had to be experienced in banking and finance. 38 Stat. 251 (1913). In 1922 the Act was amended to provide that one member be appointed who was representative of agricultural interests. 42 Stat. 620 (1922). More recently, Congress required that five of the eleven members of the Architectural and Transportation Barriers Compliance Board be "handicapped persons". 29 U.S.C. 792(a)(1)(A)(1982).

There have been no court decisions directly construing these or similar limitations. Dicta may be cited which indicates that presidential choice may be narrowed but not eliminated. Thus, Chief Justice Taney stated that while Congress may create offices, it "could not, by law, designate the persons to fill these offices. *United States* v. *Ferreira,* 54 U.S. (13 How.) 40, 51 (1851). Similarly, Chief Justice Taft noted that congressional prescription of qualifications for office does not conflict with the President's appointment power, "provided, of course, that the qualifications do not so limit selection and so trench upon Executive choice as to be in effect legislative designation". *Myers* v. *United States,* 272 U.S. 52, 128 (1926).

However, the distinction between the appointment authority and congressional power to set qualifications and preconditions for holding office was early and clearly recognized by the Supreme Court. In *United States* v. *LeBaron,* 60 U.S. (19 How.) 78 (1856), the question was raised whether a postmaster was validly appointed so that a surety company would be liable on its bond of the appointee. In the course of its opinion the Court clearly recognized that establishing preconditions for taking possession and acting in an office by Congress is distinguishable from the constitutional appointment process and that such preconditions do not burden that process (60 U.S. at 78):

> When a person has been nominated to an office by the President, confirmed by the Senate and his commission has been signed by the President, and the seal of the United States affixed thereto, his appointment to that office is complete. Congress may provide, as it has done in this case, that certain acts shall be done by the appointee before he shall enter on the possession of the office under his appointment. These acts then become conditions precedent to the complete investiture of the office; but they are to be performed by the appointee, not by the Executive; all his office has been completed when the commission has been signed and sealed; and when the person has performed the required conditions, his title to enter on the possession of the office is also complete.

LeBaron, the dicta in the *Myers* and *Ferreira* cases, and the above recited examples of historical congressional practice appear to support the constitutional validity of the requirement that at least one member of the Commission be an Indian. In light of the nature of the Commission's mission, the qualification prescribed is neither irrational nor so narrow—Indian is defined as any individual who is an enrolled member of an Indian tribe—as to, in effect, leave the President no freedom of selection at all. All that appears to be required by the Appointments Clause is that some choice, however small, must be left to the appointing authority. Congress cannot usurp the appointing function. *Buckley* v. *Valeo, supra.* The appointment qualification in question would thus appear to be within constitutional limits.

(b) The Justice Department asserts that "[t]o the extent that the term 'Native American' is defined in Section 3 of the proposed bill on the basis of racial as opposed to tribal, classifications, the requirement may well be unconstitutional," citing *Morton* v. *Mancari*, 417 U.S. 535 (1974). A cursory reading of the bill, however, demonstrates that the classification is tribal in nature and thus falls well within approved ambit of *Morton* v. *Mancari.*

Section 3(c) defines "Indian" as "any individual who is an enrolled member of an Indian Tribe". Indian Tribe, in turn, is defined as "any tribe, band, nation or other organized group or community of Indians including any Alaska Native Village . . ., which is recognized by the Federal Government or a state as eligible for special programs and services provided to Indians because of their status as Indians." (Section 3(e)). On its face, then, the classification appears in essence tribal in nature.

In *Morton* v. *Mancari*, the Court was faced with the claim that an employment preference for qualified Indians under Indian Reorganization Act of 1934 constituted an invidious racial discrimination in violation of the Due Process clause of the Fifth Amendment. The Court rejected the contention, holding that the preference was reasonable and rationally designed to further Indian self-government. It first noted that the issue turned on the "unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes. The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitutional itself," citing Article I, sec. 8, cl. 3 and Article II, sec. 2, cl. 2. 417 U.S. at 534. The Court recognized that since virtually all laws dealing with Indian tribes and reservations single out Indians living or or near reservations for special treatment, "an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized" if such laws were deemed invidious racial discrimination. The provision in question provided:

> An Indian has preference in appointment in the Bureau. To be eligible for preference in appointment, promotion, and training, an individual must be one-fourth or more degree Indian blood and be a member of a Federally-recognized Indian tribe.

Id. at 553 note 24. The Court concluded that this preference neither constituted racial discrimination or even a racial preference.

> Rather, it is an employment criterion reasonabley designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constitutional groups. It is directed to participation by the governed in the governing agency. The preference is similar in kind of the constitution requirement that a United States Senator, when elected, be "an Inhabitant of that State for which he shall be chosen," Art. I, § 3, cl. 3, or that a member of the city council reside within the city governed by the council. Congress has sought only to enable the BIA to draw more heavily from among the constituent group in staffing its projects, all of which, either directly or indirectly, affect the lives of tribal Indians. The preference, as applied, is granted to Indians not as as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion. *Id.* at 554.

Moreover, since the preference was directed only to members of "Federally recognized" tribes and thus "operates to exclude many indiviudals who are racially classifiled as 'Indians' . . . the preference is political rather than racial in nature." *Id.* at 553 note 24.

The preference found valid in *Morton* appears indistinguishable from the qualification requirement in S. 187. It is highly unlikely that a court would find it an invidious racial discrimination.

6. Conduct of litigation

The Justice Department objects, as a matter of policy, to authorizing the General Counsel of the Commission to appear in court in behalf of the agency "where appropriate". We would note that while as a general principle the conduct of government is reserved by law to the Department of Justice, *see* 28 U.S.C. 516, 518, 519 (1982) and 5 U.S.C. 3106 (1982), it is honored more in the breach than otherwise. As the attached compilation indicates, Congress has vested varying degrees of litigation authority in at least 38 agencies besides the Justice Department. That roster includes cabinet departments, independent regulatory agencies, government corporations and advisory bodies. While it is difficult to pinpoint a single reason for the numerous deviations from the purported general principle, the view that central coordination severs authority from responsibility and that substantive expertise is more likely to be found within the agencies concerned with the administration of a program, appear to be prominent underlying rationales. See Study on Federal Regulation, Volume V, pp. 54-67, Senate Committee on Governmental Operations, 95th Cong., 1st Sess. (1977). Thus Congress historically has seen itself as free to make individual judgments in this area.

MORTON ROSENBERG,
Specialist in American Public Law, American Law Division.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of Senate, the committee notes that there are no changes in existing laws made by S. 187.

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